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Ozone Rule Opponents See Potential Congressional, EPA Action

- Opponents of the 2015 ozone standards see potential for action by Congress, EPA
- Bills to be reintroduced that would delay implementation, alter EPA review process, congressional staffers say

By [Patrick Ambrosio](#)

Opponents of the 2015 ozone standards see potential avenues for Congress and Donald Trump's Environmental Protection Agency to address compliance concerns, but any effort to roll back or delay implementation of the rule will face fierce opposition from environmental and health advocates.

Absent action from Congress, new EPA leadership or the courts, the agency is on track to make its area designations this fall: a determination of which areas do and don't meet the 70 parts per billion ozone standards. Parts of at least 22 states, ranging from big cities like Los Angeles and New York to the oil- and gas-rich Uinta Basin in Utah, are unlikely to meet those standards based on air quality data, according to a 2016 Bloomberg BNA [survey](#) of state environmental agencies.

The National Association of Manufacturers and the American Chemistry Council, two industry trade groups that have been leading critics of the more stringent ozone standards, both told Bloomberg BNA that they think there is a legislative path forward for addressing their concerns with the ozone standards, as well as administrative options for the incoming Trump administration.

Environmental and public health advocates, who view the 70 ppb standards as a necessary health protection that will help avoid asthma attacks and other adverse health effects, plan to push back in the Senate and in the courts to keep implementation of the rule on track.

Areas that don't meet the ozone standards are subject to a number of requirements to reduce emissions of the pollutants that contribute to the formation of ground-level ozone, including stricter permitting requirements for new and modified industrial facilities.

Legislation Expected Soon

The push for ozone legislation will start early in the 115th Congress: Rep. Pete Olson (R-Texas) will soon reintroduce legislation that would delay implementation of the 2015 ozone standards, according to a spokeswoman for Olson's office.

The House in 2016 passed Olson's bill, known as the Ozone Standards Implementation Act, but the bill never reached the Senate floor. That bill would push back implementation of the ozone standards by eight years, while also making changes to the EPA's process for conducting future reviews of national air standards for ozone, particulate matter and other criteria pollutants.

"Mr. Olson plans on reintroducing the legislation soon," the spokeswoman told Bloomberg BNA in an e-mail. "This issue is critically important and he wants to keep it front and center."

The Ozone Standards Implementation Act is backed by a variety of industry trade organizations that are seeking delayed implementation of standards that they said are too costly and difficult to meet. In addition, several members of President-elect Donald Trump's transition team, including EPA team leader Myron Ebell, signed onto a 2016 letter supporting the bill.

The EPA has historically failed to meet its legal obligation to review national ambient air quality standards every five years, drawing deadline lawsuits from advocacy groups. While supporters of Olson's bill say that illustrates the need to change the EPA's review process, environmental and health organizations say extending the review period would further delay needed air quality improvements.

On the Senate side, Sen. Jeff Flake (R-Ariz.) introduced several ozone-related bills last Congress, including a Senate companion to the Ozone Standards Implementation Act and a bill that would change the way EPA reviews requests to exclude air quality data influenced by wildfires and other uncontrollable events from decision-making on whether an area meets the standards. A spokesman for Flake told Bloomberg BNA that the senator will be introducing similar legislation in the 115th Congress.

Supporters See Path Forward

The American Chemistry Council, in a Jan. 4 statement e-mailed to Bloomberg BNA, said it expects lawmakers to renew efforts to address "long-standing problems" with the EPA's national ambient air quality standards, including the need for states to implement two standards at the same time. Those efforts include standalone legislation like the Olson and Flake bills, as well as the possibility of including ozone-related language in appropriations bills, according to the chemical trade group.

"We would certainly like to see them get 'over the finish line' this year, and we are optimistic," the American Chemistry Council said.

Congress is expected to have a busy schedule in 2017, but Ross Eisenberg, vice president of energy and resources policy at the National Association of Manufacturers, told Bloomberg BNA that he expects there will be the "political will" to address ozone implementation concerns as members of Congress hear from metropolitan areas that will struggle to meet the standards, as well as industries that will be subject to emissions reduction requirements.

"I still think there's a legislative path for fixing some of the bigger challenges that plague the [national ambient air quality standards] process," Eisenberg said. "I do think that that avenue will remain open."

Action on ozone could come quickly in the 115th Congress, particularly if there is bipartisan support for halting implementation of the standards, according to Matt Dempsey, a spokesman for the Center for Regulatory Solutions. Dempsey noted that Colorado Gov. John Hickenlooper (D) has voiced support for suspending the 70 ppb standards, given the difficulty that Denver will face in meeting the standard. In addition, Sen. Michael Bennett (D-Colo.) has raised concerns about possible implementation difficulties.

Dempsey told Bloomberg BNA that if there is an appetite among congressional leadership to address EPA regulations, "ozone would be front and center" in that effort.

Advocates Plan Defensive Strategy

While supporters of the ozone bills see the potential for Congress to act, environmental and public health advocates will fight back against any effort to roll back protections under the Clean Air Act.

Advocacy organizations plan to launch a "vigorous defense of Americans' right to breathe clean air," John Walke, director of the climate and clean air program at the Natural Resources Defense Council, told Bloomberg BNA.

"We will fight any attempt to roll back clean air safeguards and health protections," Walke said.

In Congress, the strategy will be to make sure that any bills targeting the Clean Air Act are unable to get through the Senate, Walke said. While Congress has the option of disapproving recently issued regulations using expedited floor procedures under the Congressional Review Act, the 2015 ozone standards were issued well outside that window, meaning it will take 60 votes to overcome a filibuster in the Senate.

Paul Billings, senior vice president for advocacy at the American Lung Association, said he hopes a majority of both chambers of Congress, or at least a "large and potent minority" in the Senate, will reject any bill to undermine the ozone standards. Advocacy efforts won't focus just on Senate Democrats, as Billings said there are plans to work with senators on both sides of the aisle to help them understand the importance of the health-based ozone standards and a strong Clean Air Act.

Billings noted that a string of recent significant pollution episodes in Beijing, New Delhi and Tehran demonstrate the importance of the Clean Air Act, which he said explains why the air is so much cleaner in the U.S. than it is abroad.

Reconsideration Possible, But Difficult

If Congress is unable to get ozone legislation through the Senate, it is possible that Trump's EPA could act on its own to slow implementation of the ozone standards. While Trump has made limited mention of ozone, his pick to lead the EPA, Oklahoma Attorney General Scott Pruitt, is involved in a legal challenge to the rule.

Administrative action by the EPA, potentially through a reconsideration of the standards, is possible, but it would potentially take years and be subject to legal challenges.

"That's certainly an option, but it's not a quick option," said Eisenberg of the National Association of Manufacturers. "We're under no illusion."

There is a "pretty reliable roadmap" on how EPA could choose to reverse course on the ozone standards because the Obama administration already did it, Eisenberg said. After entering office in 2009, Obama's EPA launched an out-of-cycle reconsideration of the 2008 ozone standards of 75 ppb, but eventually abandoned the effort years later.

"Ultimately, the science will dictate where this all lands, because it has to, but we think there are process issues that would justify a reconsideration," Eisenberg said.

Seth Jaffe, a partner at Foley Hoag LLP in Boston, predicted that it would be difficult for the Trump administration to come up with a legal justification to withdraw the 70 ppb standards. Jaffe's practice covers a range of environmental issues, including permitting and enforcement under the Clean Air Act.

Jaffe said Trump's EPA would have to come up with a new explanation for why the 2008 standards shouldn't have been tightened that fully addressed conclusions by the Clean Air Scientific Advisory Committee, a panel of independent advisers, that a standard higher than 70 ppb wouldn't be protective of public health.

"The courts have pretty clearly said you've got to have a pretty clear explanation," Jaffe told Bloomberg. "I don't see how this administration can come up with a record that would survive judicial review."

Flexibility for Trump's EPA

While a full reconsideration of the level at which the ozone standards are set might be difficult, some say Trump's EPA would have some flexibility to address industry and state implementation concerns.

William Yeatman, a senior fellow at the Competitive Enterprise Institute, acknowledged that there is "not a lot" the EPA would be able to do administratively to reverse course on the 70 ppb standards, given that the courts have barred the agency from considering cost in setting the health standards and required the agency to follow the advice of the CASAC. Two of Yeatman's colleagues at the Competitive Enterprise Institute—Ebell and Christopher Horner—are serving on the Trump transition's EPA review team, but Yeatman has no involvement with the transition.

While changing the 70 ppb level would be very difficult, Yeatman told Bloomberg BNA that the EPA under Pruitt could achieve a "de facto relaxation" of the standards through the implementation process, which is largely at the discretion of the administration.

Olson's office also said they think the discretion afforded to the EPA in the implementation process could help address some concerns.

"While many issues related to ozone are driven by statute, interpretation and implementation are always key, given the amount of deference given to agencies," the spokeswoman for Olson said. "Rep. Olson is confident that positive steps can be taken by the incoming administration."

The EPA has yet to issue its implementation rule for the 2015 ozone standards, which will address a range of requirements for the state environmental agencies that are tasked with implementing the 70 ppb standards. The American Chemistry Council said that implementation rule will give incoming EPA leadership "an opportunity" to address issues created by the overlapping 2008 and 2015 standards.

Advocates to Continue Legal Defense

The Trump administration will take over the EPA not long before a federal appeals court is scheduled to hear arguments over the legality of the 2015 ozone standards, including challenges

from Oklahoma and other states. Arguments originally were set for February, but the U.S. Court of Appeals for the District of Columbia Circuit recently rescheduled those arguments for April 19 (Murray Energy v. EPA, D.C. Cir., No. 15-1385, 12/19/16).

The American Lung Association and other advocacy organizations that are intervening in that litigation on behalf of the EPA will continue to defend the rule, no matter how vigorously the Trump administration decides to defend the Obama-era decision on where to set the standards.

"We will make sure that the court is fully informed of what the law requires and what the science says," Billings said. "That's what being an intervenor gives us: participatory rights in the case, and we'll make sure our views are heard."

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